

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 26, 2012 Session

JOHN J. CAMPBELL CO., INC. et al. v. JUAN BELTRAN

**Appeal from the Circuit Court for Shelby County
No. CT00029710 Kay Spalding Robilio, Judge**

No. W2011-01388-SC-WCM-WC - Mailed May 10, 2012; Filed August 17, 2012

An employee received workers' compensation benefits for a traumatic brain injury he suffered while working for his employer. The employee's claim was settled for 21% permanent partial disability to the body as a whole. After experiencing additional difficulties, the employee sought reconsideration of those benefits. The trial court awarded the employee 55% permanent partial disability to the body as a whole. The employee has appealed, contending that the award was inadequate. After a review of the record, we affirm the trial court's judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Circuit Court Affirmed**

TONY A. CHILDRESS, SP. J., delivered the opinion of the Court, in which JANICE HOLDER, J., and DONALD P. HARRIS, SR. J., joined.

John E. Dunlap, Memphis, Tennessee, for the appellant, Juan M. Beltran

D. Andrew Saulters, Memphis Tennessee, for the appellees, John J. Campbell Co., Inc. and CNA Insurance Co.

MEMORANDUM OPINION

Factual and Procedural Background

Juan Beltran began working for the John J. Campbell Co., Inc. ("Campbell Co.") in January 2001. His work included climbing ladders, roof repair, and heavy lifting. On November 2, 2007, Mr. Beltran fell thirty feet from a ladder and struck his head. Mr. Beltran

was taken to the emergency room and diagnosed with a traumatic brain injury. Mr. Beltran underwent immediate surgery to remove an acute subdural hematoma. Several days later, Mr. Beltran underwent a second procedure to remove an epidural hematoma. On November 16, 2007, Mr. Beltran underwent a lumbar puncture to drain spinal fluid.

After being released from the hospital, Mr. Beltran was treated by Dr. Shelly Timmons, a neurological surgeon. Mr. Beltran began complaining of “headaches,” “weird feelings in his ears,” and dizziness in January 2008. Dr. Timmons stated that a bone flap, a displacement of a part of Mr. Beltran’s skull, had not been replaced and that his symptoms were common following a traumatic brain injury. Dr. Timmons reviewed a magnetic resonance imaging scan (“MRI”) of Mr. Beltran’s brain and noted that his neurological examination was “very good.” During the January 2008 exam, Mr. Beltran exhibited no cognitive impairments, confusion, weakness, or tremors.

On January 24, 2008, Dr. Timmons repaired the bone flap on Mr. Beltran’s skull. At a follow-up appointment several weeks later Mr. Beltran complained of chest pain. Mr. Beltran also reported some dizziness with rapid change of position but was otherwise doing well. Mr. Beltran denied having any cognitive problems, tingling, numbness, weakness, visual, hearing, speech or other neurological problems. Dr. Timmons described Mr. Beltran’s improvement as remarkable, and Mr. Beltran returned to work for Campbell Co. on April 15, 2008.

Dr. Timmons referred Mr. Beltran to Dr. Manual F. Carro, a rating specialist, in June 2008. Dr. Carro assigned Mr. Beltran a 14% permanent impairment rating to the body as a whole. In August 2008, Mr. Beltran returned to Dr. Timmons complaining of headaches, dizziness, ringing in his ears, and weakness when working in the heat. Dr. Timmons prescribed Tylenol with codeine. She advised Mr. Beltran that he may be unable to perform the same heavy construction work he had been doing before his injury.

In January and February of 2009, Mr. Beltran was evaluated by Dr. Lance Wright.¹ Mr. Beltran reported to Dr. Wright that he was having headaches several times per week, particularly where the bone flap had been replaced. Mr. Beltran also complained of blurred vision, light and sound sensitivity, nausea, vomiting and nosebleeds. Mr. Beltran was prescribed medications for migraines and was instructed not to do roofing work. In February 2009, Campbell Co. settled Mr. Beltran’s workers’ compensation claim, agreeing to 21% permanent partial impairment to the body as a whole. Several days later, Mr. Beltran felt he

¹ Dr. Wright was an associate of Dr. Timmons. Although Dr. Wright did not testify, Dr. Timmons testified about Dr. Wright’s examinations of Mr. Beltran based on the applicable medical records.

was physically unable to perform his work at Campbell Co. and he ceased working for his employer.

Mr. Beltran now seeks reconsideration of the settlement. After a Benefit Review Conference resulted in an impasse, Campbell Co. filed this action on January 21, 2010, to determine its obligations. A trial was held on the sole issue of vocational disability. This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. Tenn. Sup. Ct. R. 51.

Dr. Timmons testified by deposition that after the settlement, she continued to treat Mr. Beltran. In March 2009, Mr. Beltran told Dr. Timmons that he was still having headaches and pain near the bone flap. After a computed tomography scan, Dr. Timmons found that "there had been some reabsorption of the bone flap." As a result, in April 2009, Dr. Timmons removed the bone flap and inserted a customized plastic implant. Shortly after the surgery, Mr. Beltran reported having a seizure, for which he was given medication.

Beginning in July 2009, Dr. Timmons examined Mr. Beltran multiple times over the next several months. During these examinations, Mr. Beltran complained of blurred vision and other symptoms, an inability to work outside without getting headaches and depression. Dr. Timmons referred Mr. Beltran to a psychiatrist and a neuro-ophthalmologist. Dr. Timmons also gave Mr. Beltran a letter informing Campbell Co. that Mr. Beltran "was unable to return to construction work due to his inability to tolerate outdoor physical exertion and imbalance." Dr. Timmons stated that at the time this letter was written in July 2009, Mr. Beltran could work indoors but could not work in the heat or at heights. In September 2009, Mr. Beltran reported blurred vision, dizziness, and trouble sleeping. Dr. Timmons, however, concluded that Mr. Beltran had no neurological deficits and that his symptoms may have been related to his seizure medications.

On December 1, 2009, Mr. Beltran reported that his headaches were no longer as severe or as frequent. Dr. Timmons noted that Mr. Beltran "was significantly improving" but should not do any work at heights. In June 2010, Mr. Beltran reported some headaches, blurred vision, and vertigo when he moved too quickly. Although Dr. Timmons stated that Mr. Beltran "had a good neurological examination" and a "well-healed wound," she did not believe that he would be able to go back to the type of work he had previously done. In August 2010, Mr. Beltran again reported to Dr. Wright that he was experiencing severe headaches.

Dr. David Strausser, Ph.D., a vocational rehabilitation expert, assessed Mr. Beltran in October 2009. After reviewing Mr. Beltran's work and medical histories, Dr. Strausser

found that Mr. Beltran had a 92% vocational impairment. Dr. Strausser opined that Mr. Beltran was unsuited for driving or working with heavy machinery due to his dizziness and seizures. Dr. Strausser acknowledged that Mr. Beltran may be able to do light work, in such capacities as a janitor, a cafeteria attendant, an assembler, or a security guard. Dr. Strausser stated that the Spanish-speaking population in the area where Mr. Beltran lived had grown in recent years and that there were job opportunities in that area for someone such as Mr. Beltran who spoke Spanish. Dr. Strausser conceded that he prepared his assessment before Dr. Timmons' final evaluation in June 2010, and that he did not read her deposition. Dr. Strausser also conceded that he would place Mr. Beltran in medium class work if Mr. Beltran could lift fifty pounds and that his rating would significantly change if he were placed in medium class work.

Dr. David Stewart also testified as a vocational rehabilitation expert. Dr. Stewart stated that he reviewed Mr. Beltran's medical and work histories, that he read Dr. Timmons' deposition, and that he evaluated Mr. Beltran on September 24, 2010. Dr. Stewart concluded that Mr. Beltran had a vocational disability of 30%. Dr. Stewart explained that Mr. Beltran could do medium class work, which involves lifting up to fifty pounds. Dr. Stewart disagreed with Dr. Strausser's opinion that Mr. Beltran was limited to light work. Dr. Stewart believed that Mr. Beltran was "exceedingly cautious" in assessing his ability to work and that his answers to Dr. Stewart's questions had not been direct. Dr. Stewart acknowledged that Dr. Timmons testified she saw no evidence that Mr. Beltran was malingering.

Mr. Beltran, whose English is limited, testified through an interpreter about his work history and his employment with Campbell Co.. Mr. Beltran testified that when he returned to work after his injury, he was unable to climb ladders or work on roofs, so he assisted employees with other tasks on the ground. Mr. Beltran testified that he continued to have headaches and dizziness, and that he was unable to lift anything or move quickly.² Mr. Beltran testified that he gets headaches when he works in the heat, that he gets dizzy when he tries to "do anything," and that he is unable to play with his children. Although he stated that he is unable to work in any capacity, Mr. Beltran admitted that he had not looked for any employment or pursued any type of training since leaving Campbell Co..

After hearing the proof, the trial court assigned 55% permanent partial disability to Mr. Beltran's body as a whole. The standard of review of findings of fact in a workers' compensation case is "de novo upon the record of the trial court, accompanied by a

² Mr. Beltran's wife and brother both testified that Mr. Beltran had a strong work ethic prior to his head injury. They stated that following his injury, Mr. Beltran was unable to work due to severe headaches and depression.

presumption of correctness of the finding, unless the preponderance of evidence is otherwise.” Tenn. Code Ann. § 50-6-225(e)(2) (2008). A trial court’s conclusions of law are reviewed de novo upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis Vocational Disability

Mr. Beltran argues that the trial court’s determination of 55% permanent partial disability to the body as a whole was inadequate. Campbell Co. argues that the evidence does not preponderate against the trial court’s judgment, particularly given the trial court’s findings about Mr. Beltran’s credibility.

Mr. Beltran is eligible for reconsideration under Tennessee Code Annotated section 50-6-241(d)(1)(B)(i).³ Mr. Beltran received 21% partial permanent disability to his body as a whole as part of the original settlement, and he was employed a total of ten months after his injury. The trial court therefore was required to reevaluate Mr. Beltran’s claim of injury to determine if he is entitled to modified permanent partial disability benefits. In making determinations as to vocational disability, the trial court must consider “all pertinent factors, including lay and expert testimony, employee’s age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant’s disabled condition.” Tenn. Code Ann. § 50-6-241 (2008).

The evidence established that Mr. Beltran, age twenty-six at the time of trial, was born in Mexico and moved to the United States when he was sixteen. Mr. Beltran had worked as a farm laborer, in a warehouse, and in landscaping prior to being employed by Campbell Co.. Mr. Beltran has an eighth grade education and his English speaking skills are limited. It was undisputed that Mr. Beltran suffered a significant injury to his head and that this injury has limited some of the opportunities available to him. However, the pertinent question is whether Mr. Beltran’s injury has rendered him completely unable to work as he claims.

Mr. Beltran stated that his injuries prevent him from working at any regular job. Mr. Beltran’s self-assessment of his physical condition and resulting disabilities may not be

³ Tennessee Code Annotated section 50-6-241(d)(1)(B) provides, in pertinent part:

(B)(i) If an injured employee receives benefits for body as a whole injuries pursuant to subdivision (d)(1)(A) and the employee is subsequently no longer employed by the pre-injury employer at the wage specified in subdivision (d)(1)(A) within four hundred (400) weeks of the day the employee returned to work for the pre-injury employer, the employee may seek reconsideration of the permanent partial disability benefits.

disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn.1975). The trial court, however, found Mr. Beltran's self-assessment of his injuries not to be credible concerning his physical impairment. When credibility and weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge had the opportunity to observe the witnesses' demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 900 (Tenn. 2009). The trial court found Mr. Beltran's testimony that he could not play with his children to be unreasonable. The trial court also found the fact that Mr. Beltran had not sought other employment for over two years "demonstrate[d] a wilfulness to self limit."

Although there was conflicting expert testimony, the trial court found that Mr. Beltran was able to obtain other employment in his disabled condition. In reaching its conclusion, the trial court is not bound to accept physicians' opinions regarding the extent of a claimant's disability. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn.1983). Instead, the trial court is to "consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability." Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998) (citing Hinson, 654 S.W.2d at 677).

An examination of the record reveals that Mr. Beltran's symptoms from his injury improved and became manageable. The record also reflects that Mr. Beltran's headaches were no longer as severe or as frequent. Mr. Beltran suffered one seizure due to his dizziness, but medication has since resolved this issue. Lastly, Mr. Beltran testified to a heat intolerance. While this intolerance does significantly limit Mr. Beltran's employment opportunities, both experts testified at trial that there were employment options available to Mr. Beltran. Relying on Dr. David Stewart's testimony, the trial court found there were indoor employment opportunities available to Mr. Beltran. The trial court found the lack of effort to find these available jobs showed "a willfulness in his attitude and behavior that doesn't deserve being countenanced."

The trial court's award of 55% permanent partial disability is below Dr. Strausser's determination of 92% yet above Dr. Stewart's determination of 30%.⁴ "Although an appellate court may certainly reverse or modify a trial court's award of workers' compensation benefits under the appropriate circumstances, it is not the role of the appellate court to simply substitute its judgment for that of the trial court in accessing an employee's vocational disability." Howell v. Nissan North America, Inc., 346 S.W.3d 467, 474 (Tenn. 2011) (citing

⁴ Mr. Beltran's original workers' compensation award was based on a 14% permanent impairment rating to the body as a whole. Since this is a reconsideration case, the most the trial court could have awarded Mr. Beltran was 84%(14% x 6) permanent partial disability. See, e.g., Lazar v. J.W. Aluminum, 346 S.W.3d 438, 442 (Tenn. 2011).

Tryon v. Saturn Corp., 254 S.W.3d 321, 335 (Tenn. 2008). In light of evidence in the record and the trial court's assessment of Mr. Beltran's credibility, we do not conclude that the evidence preponderates against the trial court's award of 55% permanent partial disability.

Conclusion

For the foregoing reasons, the trial court's judgment is affirmed. Costs are assessed to Employee, Juan Beltran, for which execution shall issue if necessary.

TONY A. CHILDRESS, SPECIAL JUDGE

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Juan M. Beltran pursuant to Tennessee Code Annotated section 50-6-225(e)(5)(A)(ii), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Juan M. Beltran, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Janice M. Holder, J., not participating